State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: May 8, 2008

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Bennett, Brown)
Division of Regulatory Compliance & Consumer Assistance (Hicks)

RE: Docket No. 080039-EI – Complaint of Sallijo A. Freeman against Florida Power & Light Company for violation of Rule 25-6.105, F.A.C.

AGENDA: 05/20/08 – Regular Agenda – Motion to Dismiss – Complainant Customer Requests Opportunity to Address Commission

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Skop

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\080039.RCM.DOC

Case Background

On April 4, 2007, Ms. Sallijo Freeman filed a complaint (Cats No. 731758E) with the Public Service Commission's Bureau of Complaint Resolution against Florida Power & Light Company (FPL or utility). The complaint was filed pursuant to Rule 25-22.032, Florida Administrative Code (F.A.C.), and included jurisdictional and non-jurisdictional issues. Over the next several months, Commission staff worked with Ms. Freeman to assist in resolving her jurisdictional complaints and to explain the proper venue for her non-jurisdictional complaints. A synopsis of the informal complaint process as it relates to Ms. Freeman's complaint is included with this recommendation as Attachment A. As a result of the complaint process, Ms. Freeman's electric service was restored on April 12, 2007, and continued during the pendency of the dispute resolution process. The disputed amount was established as $1,600.00. The dispute

involved two accounts for the same location, one in Ms. Freeman's name and one in the name of Ms. Freeman's deceased mother, Nedra Rice. The dispute concerned high charges allegedly resulting from an air-conditioner malfunction. Staff explained on several occasions that the Commission could not require FPL to pay for any damages to appliances, to her home, for loss of business, or for spoilage of food and medicines. Staff explained that only a court of appropriate jurisdiction would be able to rule on a complaint for damages. FPL offered to resolve the jurisdictional complaint by crediting the disputed amount. Ms. Freeman did not want to sign the proposed Settlement Agreement offered by FPL because the settlement dollar amount was left blank. Thereafter, FPL indicated that it would apply the credit of $1,600.00 to Ms. Freeman's accounts without a settlement agreement. Based on FPL's resolution of the disputed amount, staff closed Ms. Freeman's complaint. On October 2, 2007, FPL credited Ms. Freeman's account $505.18 and sent a check for $1,146.12 to the estate of Nedra V. Rice, mother of Ms. Freeman. The total paid and credited was $1,651.30. According to staff's records, Ms. Freeman had unpaid electric bills in addition to the amount in dispute. On October 23, 2007, FPL disconnected Ms. Freeman's service for non-payment of bills. According to FPL, it had received no payment on Ms. Freeman's account since April 2007.

Ms. Freeman was not satisfied with FPL or staff's proposed resolutions to her complaints, and on December 18, 2007, Ms. Freeman filed a formal petition against FPL pursuant to Sections 120.569 and 120.57, Florida Statutes (F.S.), and Rules 25-22.036 and 28-106.201, F.A.C. In her petition, Ms. Freeman alleged that FPL disconnected her electricity without giving five days' notice, as Rule 25-6.105, F.A.C., requires. In her formal petition, Ms. Freeman requested that her electric service be restored. Ms. Freeman also requested that FPL replace her computers, refrigerator, coffee maker, and microwave.

While her formal complaint appears to only address the termination of services, it is apparent from the request for relief found in the petition that Ms. Freeman wishes the Commission to also consider and rule on the damages portion of her complaint against FPL. In her original customer complaint, Ms. Freeman complained that there was improper and excessive billing and improper disconnection of service by FPL in April 2007, and again in October 2007. Ms. Freeman also alleged that FPL was responsible for damages to her home in 2005, allegedly caused by an air-conditioning repairman selected from an FPL website. She claimed there were damages to her appliances caused by power surges, and she claimed a loss of business during the times her electricity was disconnected. Ms. Freeman also claimed food and medicine spoilage losses as the result of improper interruption of service.

The Commission clerk served Ms. Freeman's formal complaint on FPL on January 17, 2008. On February 5, 2008, FPL filed a Motion to Dismiss the Complaint. On February 22, 2008, Ms. Freeman sent a response to the Motion to Dismiss by facsimile to the attorney for FPL and to the Commission staff attorney. Ms. Freeman subsequently filed the response with the Commission Clerk on February 27, 2008. In her responsive pleading, Ms. Freeman requested an opportunity to address the Commission for the purpose of presenting evidence with respect to her complaint against FPL.

On March 3, 2008, FPL requested that its Motion to Dismiss, originally scheduled for March 18, 2008 Agenda Conference, be deferred. In its request, FPL stated that it had restored

power to Ms. Freeman. In response, Ms. Freeman objected to any extension. Ms. Freeman stated that she still wished to present her case to the Commission. On April 2, 2008, Ms. Freeman and FPL agreed to a deferral to the May 20, 2008 Agenda Conference.

The Commission has jurisdiction pursuant to Sections 366.04, 366.05, 366.06, 366.07, and 366.076, F.S., to consider violations of its rules, statutes, and orders. The Commission does not have jurisdiction to consider claims for damages. See, Southern Bell Telephone and Telegraph Company v. Mobile America Corporation, Inc., 291 So. 2d 199, 202 (Fla. 1974).

Discussion of Issues

Issue 1: Should the Commission grant Petitioner Sallijo Freeman's request to address the Commission at the Agenda Conference on May 20, 2008?

Recommendation: The Commission should grant Ms. Freeman's request to address the Commission on May 20, 2008, on the Motion to Dismiss. However, the Commission should limit the presentation to the issues raised by the Motion to Dismiss, which is whether Ms. Freeman's petition alleges facts sufficient to state a cause of action upon which relief may be granted. (Bennett)

Staff Analysis: In her February 2008, responsive pleading, Ms. Freeman requested an opportunity to address the Commission and to present her evidence at the Commission's Agenda Conference. Although the May 20, 2008, Agenda Conference is not an evidentiary hearing, staff recommends that the Commission treat Ms. Freeman's request as a request for oral argument on the Motion to Dismiss. Rule 25-22.0022(7)(a), F.A.C., provides that oral argument will only be entertained by the Commission for dispositive motions, such as a motion to dismiss. Staff recommends that, consistent with staff's recommendation on Issue 2, the argument be limited to the issue of whether Ms. Freeman's petition alleges facts sufficient to state a cause of action upon which relief may be granted.

The Commission should deny Ms. Freeman's request to address the Commission at the May 20, 2008, Agenda Conference, for the purpose of presenting evidence. The purpose of this Agenda Conference is only to consider FPL's Motion to Dismiss.

Issue 2: Should the Commission grant Florida Power & Light Company's Motion to Dismiss the Complaint of Sallijo A. Freeman?

Recommendation: The Commission should grant Florida Power & Light Company's Motion to Dismiss. Although petitioner's complaint alleges facts which, when taken as true and construed in the light most favorable to the petitioner, state a cause of action, there is no additional relief that the Commission may grant the petitioner. In her complaint, petitioner has asked that FPL be directed to restore her power. FPL has restored Ms. Freeman's electrical service. The petitioner has also asked that she be awarded damages resulting from the allegedly improper termination of services. The Commission lacks jurisdiction to award monetary damages.

Staff Analysis:

Standard of Review

A motion to dismiss raises as a question of law the sufficiency of the facts alleged in a petition to state a cause of action. See Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). The standard to be applied in disposing of a motion to dismiss is whether, with all factual allegations in the petition taken as true and construed in the light most favorable to the petitioner, the petition states a cause of action upon which relief may be granted. When "determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side." Id.

FPL's Motion

In FPL's Motion, it argued that a pleading should be dismissed unless all of the elements of a cause of action are properly alleged. FPL contended that the Uniform Rules of Procedure require that petitions initiating proceedings specifically state the facts, rules, and law that warrant relief. FPL asserted that Ms. Freeman did not state any specific facts supporting her claim. FPL alternatively requested that the complaint be dismissed on its merits. According to FPL, Ms. Freeman has received several notices of disconnection for non-payment and has acknowledged the same to staff. Finally, FPL asserted that Ms. Freeman was aware that her claim for damages is outside the jurisdiction of this Commission, and that her complaint lacks merit.

Subsequent to FPL filing its Motion to Dismiss, staff received an e-mail from FPL stating that FPL had restored power to Ms. Freeman.

Ms. Freeman's Response

Ms. Freeman responded that her petition was based on facts that will be presented at the hearing. Ms. Freeman stated she has documents, telephone logs, and will subpoena FPL witnesses to support her assertions. Ms. Freeman stated that she will have proof to substantiate her claim available at the hearing. Ms. Freeman also argued that the rules of administrative procedure do not require her to attach evidence to the initial filing.

Ms. Freeman's response not only stated that she has alleged ultimate facts, she also requested that she be allowed to present those facts at the agenda conference at which the Motion to Dismiss is considered. Ms. Freeman further requested that an investigation into FPL's conduct commence immediately.

In response to FPL's e-mail requesting its deferral of the Motion to Dismiss, Ms. Freeman responded that she still wished for the Commission to consider her complaint against FPL, and that she was dissatisfied with the manner in which the utility had treated her complaints. After the first deferral, Ms. Freeman and FPL agreed to a second deferral, postponing the oral argument on FPL's Motion to Dismiss until May 20, 2008.

Staff Analysis

Cause of Action

According to Commission Rule 25-22.036, F.A.C., to initiate a formal proceeding, a complainant must allege actions that constitute a violation of the Commission's rules, orders, or statutes. Ms. Freeman's complaint alleges that FPL disconnected her electricity without giving her five days' notice. The rule in question, 25-6.105, F.A.C., governs when and how a utility may refuse or discontinue service to a customer. Subsection 5(g) provides that a utility may discontinue service:

> For non-payment of bills or non-compliance with the utility's rules and regulations, and only after there has been a diligent attempt to have the customer comply, including at least five (5) working days' written notice to the customer, such notice being separate and apart from any bill for service . . . .

Ms. Freeman has alleged an action by the utility which, if proven, is a violation of the Commission's rules; therefore, Ms. Freeman's petition has stated a cause of action. However, there is no relief left for the Commission to grant to Ms. Freeman. The only relief the Commission could have granted Ms. Freeman was to require FPL to reconnect electric service. FPL has already restored Ms. Freeman's service. FPL must comply with Commission rules prior to disconnecting Ms. Freeman's service.

The remainder of the requested relief involves a request for monetary damages. As discussed below, the Commission lacks subject matter jurisdiction to award any of the other relief the petitioner has asked for.

Subject Matter Jurisdiction

The petitioner has requested that the Commission direct FPL to replace her computers, refrigerator, coffee maker, and microwave. In prior correspondence with the Commission staff, Ms. Freeman had also asked that she be made whole for her loss of business and for damages to her home allegedly caused by an air-conditioning contractor that petitioner selected from FPL's website.

It is well settled that jurisdiction to award monetary damages in negligence and contract disputes is outside of the Commission's jurisdiction. See, Southern Bell Telephone and Telegraph Company v. Mobile America Corporation, Inc., 291 So. 2d 199, 202 (Fla. 1974) ["Nowhere in Ch. 364 is the PSC granted authority to enter an award of money damages (if indicated) for past failures to provide telephone service meeting the statutory standards; this is a judicial function within the jurisdiction of the circuit court pursuant to Art. V, section 5(b), Fla. Const."]; Florida Power & Light Company v. Glazer, 671 So. 2d 211 (3rd DCA 1996) (affirming the application of Southern Bell to a tort claim against FPL); Order No. PSC-99-1054-FOF-EI, issued May 24, 1999, in Docket No. 981923-EI, In re: Complaint and petition of John Charles Heekin against Florida Power & Light Company (finding that the Commission lacked subject matter jurisdiction to award monetary damages for alleged property damage to a customer's gate, and therefore dismissal of the complaint was appropriate because the requested relief could not be granted by the Commission). As explained above, to withstand a motion to dismiss a complaint must state a cause of action upon which relief can be granted. If relief cannot be granted, the complaint should be dismissed.

Conclusion

The Commission should grant FPL's Motion to Dismiss. Although Ms. Freeman's complaint states a cause of action, there is no relief which the Commission can grant Ms. Freeman if she were to prove her assertions.

Issue 3: Should this docket be closed?

Recommendation: Yes. If the Commission accepts staff's recommendation in Issue 2, this docket should be closed after the time for appeal has expired. (Bennett)

Staff Analysis: If the Commission accepts staff's recommendation on Issue 2, this docket should be closed after the time for appeal has expired.

Synopsis of Informal Complaint Process for Complaint #731758	
DATE:	**ACTION:**
April 4, 2007	Commission Complaint # 731758 was relayed to FPL in response to e-mail correspondence received from Ms. Freeman, who was without electric service. Pursuant to Rule 25-22.032, FPL was directed to respond by April 25, 2007
April 11, 2007	Ms. Freeman called the Commission. Commission staff established a disputed amount of $1,600.00. Ms. Freeman's electrical service cannot be terminated for the disputed amount.
April 12, 2007	Ms. Freeman's electric service is restored.
April 23, 2007	FPL provided resolution response to the Commission in a timely manner. FPL's report included a copy of the resolution response letter dated April 19, 2007, that FPL mailed to Ms. Freeman. FPL also provided a billing summary and billing clarification. At the time of the report, Ms. Freeman's account balance was $1,363.17. Ms. Freeman was offered a high bill investigation but she declined the offer.
May 5, 2007	Ms. Freeman called the Commission staff and expressed her dissatisfaction with FPL's resolution and response to her complaint.
May 8, 2007	Staff's attempts to reach Ms. Freeman by telephone were unsuccessful.
May 17, 2007	FPL sent a supplemental report to Commission staff in response to Ms. Freeman's Resolution Objection. FPL addressed the following points:
	(1) No payment was received on Ms. Freeman's account since it was placed in her name.
	(2) FPL denied responsibility for any faulty air-conditioner installation by the contractor. FPL also denied her claim for personal damages and losses.
	(3) As a customer courtesy, FPL offered to reduce Ms. Freeman's billing, which may have been caused by her air-conditioning problems. In order to reduce her bill, FPL requested that Ms. Freeman sign a Confidential Settlement Agreement. FPL provided documentation of communications sent to Ms. Freeman regarding this matter.
May 30, 2007	FPL provided a supplemental report, which included an account summary and account audit for both disputed accounts (Ms. Freeman's account and Ms. Freeman's deceased mother's account)

Synopsis of Informal Complaint Process for Complaint #731758	
DATE:	**ACTION:**
June 7, 2007	An e-mail was received from Ms. Freeman. She indicated she had been unable to come to an agreement with FPL.
June 13, 2007	Staff mailed an Objection Resolution Letter to Ms. Freeman on this date and included:
	(1) A summary of documentation provided by FPL;
	(2) A Statement of Claim was sent to Ms. Freeman by FPL on February 13, 2006, for her use in requesting repair to her damaged computer and appliances. As of May 17, 2007, Ms. Freeman had not presented the requested documents;
	(3) Ms. Freeman was advised the Commission does not have authority over claims for damages;
	(4) Ms. Freeman was advised that she is responsible for payment of her monthly bills;
	(5) A summary of Ms. Freeman's account was enclosed with the letter.
June 25, 2007	The Commission received an e-mail from Ms. Freeman requesting a "formal hearing," regarding her claims against FPL.
July 9, 2007	FPL provided a supplemental report, which included the following information:
	(1) FPL received Ms. Freeman's Statement of Claimant at the beginning of June 2007 but Ms. Freeman's documentation did not include any cost for repairs;
	(2) FPL mailed a letter Ms. Freeman on July 2, 2007, requesting an estimate for computer repairs. The information was needed to complete the claim request;
	(3) FPL e-mailed Ms. Freeman on July 9, 2007, requesting that she provide estimated repair bills and the date of her damage. The e-mail also reiterated FPL's billing adjustment. FPL required a Settlement Agreement to be signed.
July 10, 2007	Staff mailed a follow-up Objection Resolution letter to Ms. Freeman in which:
	(1) Ms. Freeman was advised that the Commission had no regulatory authority over damage claim matters and that she should pursue her claim for damages with FPL or through the courts;

Synopsis of Informal Complaint Process for Complaint #731758	
DATE:	**ACTION:**
	(2) Ms. Freeman was reminded that although not required, FPL offered her a billing adjustment. She was also reminded that FPL required a Settlement Agreement before it can complete the billing adjustment;
	(3) Ms. Freeman was reminded that regardless of the outcome of her damage claim, she must pay her monthly electric bills.
July 25, 2007	Staff received a telephone call from Ms. Freeman.
July 26, 2007	Based on Ms. Freeman's telephone conversation, the complaint was escalated to the Commission's Complaint Bureau Resolution Review Team.
July 26, 2007	Resolution Review Team Regulatory Consultant, Kate Smith spoke with Ms. Freeman regarding her complaint. On the same date Ms. Smith sent an e-mail informing Ms. Freeman that the Commission cannot grant her a hearing on any topic over which the Commission has no authority.
July 27, 2007	Ms. Freeman was informed by Commission staff that if Ms. Freeman wanted a formal hearing, the request must be made in writing and addressed to the Commission Clerk.
July 27, 2007	Ms. Smith e-mailed Ms. Freeman and advised her that:
	(1) FPL was willing to settle the complaint but that FPL required that a Settlement Agreement be signed;
	(2) Ms. Freeman was again advised that the Commission had no authority over negligence or malfeasance claims.
July 27, 2007	Ms. Freeman called and spoke with Ms. Smith and indicated that Ms. Freeman had advised FPL to prepare the Settlement Agreement and that she would sign it.
July 30, 2007	An e-mail was received by the Commission from Ms. Freeman indicating that she would not sign the Settlement Agreement because FPL did not include a specific amount in the document.
July 31, 2007	Ms. Smith e-mailed Ms. Freeman and advised her that FPL is being asked to provide a credit to Ms. Freeman's account for approximately $1,600.00. Ms. Freeman was advised that once the adjustment was made, Ms. Freeman's account was subject to normal collection action.

Synopsis of Informal Complaint Process for Complaint #731758	
DATE:	**ACTION:**
September 10, 2007	Ms. Freeman's complaint was closed by Commission staff.
October 1, 2007	The Commission received a supplemental report from FPL stating:
	(1) FPL had issued customer courtesy credits for a total of $1,651.30 as follows: A check in the amount of $1,146.12 to the estate of Nedra V. Rice, the mother of Ms. Freeman for courtesy credits to the home during the time Ms. Rice was listed as the account holder for the property. A credit to Ms. Freeman's account was made on the same date in the amount of $505.18.
	(2) FPL included an explanation of the credits and an up-to-date account audit summary for both accounts.
October 2, 2007	Ms. Smith e-mailed Ms. Freeman and advised her that FPL had sent a check to Ms Freeman in the amount of $1,146.12 made payable to the estate of Nedra Rice and that a credit of $505.18 was applied to Ms. Freeman's account. Ms. Smith also informed Ms. Freeman that she still owed $1,546.66 on the account and that Ms. Freeman should contact FPL if she wished to make payment arrangements. In addition, Ms. Smith advised Ms. Freeman that any proof of payment should be sent to Ms. Smith. Later the same day, Ms. Freeman stated she would be contacting FPL to get a copy of the bill. She also stated she was looking for proof of prior payments and she was preparing pictures of the damage to the house caused by the air-conditioner repairman. Ms. Smith responded stating that since Ms Freeman is planning on filing a formal complaint, that Ms. Freeman should gather all her documentation and save it for the hearing. Ms. Smith further advised Ms. Freeman that the Commission staff could do nothing further for Ms. Freeman.
October 15, 2007	FPL asked if the Commission staff had further contact from the customer. FPL reported that the customer had not contacted it to make payment arrangements and that FPL's check to the estate of Nedra Rice had been cashed. FPL wished to take collection action.
October 25, 2007	Ms. Freeman's service was interrupted for nonpayment.
October 25, 2007	Ms. Freeman contacted the Commission alleging that she wished her service to be restored and that all of her concerns were related to FPL's air-conditioner contractor who did not properly install her air-conditioning unit.

Synopsis of Informal Complaint Process for Complaint #731758	
DATE:	**ACTION:**
October 25, 2007	Ms. Freeman contacted the Commission's complaint bureau to file a new complaint against FPL disputing the method used to calculate her bill. Ms. Freeman stated that FPL admitted to her in a letter that she had been billed incorrectly. Ms. Freeman was advised to mail or fax the letter she received from FPL. She stated she could not do so. Ms. Freeman also felt that she could not be disconnected for the disputed amount and alleged that she had made a $53.06 payment the prior week and that was the only amount not disputed. Ms. Freeman requested a formal hearing.
November 1, 2007	Additional correspondence was received from Ms. Freeman that appeared to indicate she was requesting a formal hearing. She also indicated she had not made payments for service. Ms. Freeman also requested FPL replace her four computers.
November 28, 2007	Ms. Freeman contacted Commission staff asking for the formal hearing she said she had previously requested. Commission staff contacted FPL and then Ms. Freeman to discuss the status of her account and the complaint.
November 29, 2007	Ms. Freeman responded that no one responded to her e-mails and that she had an agreement with FPL. She asked for an expedited hearing.
December 3, 2007	Ms. Freeman was contacted by telephone and by e-mail explaining the informal complaint process, why her complaint was closed. She was given a copy of the Rule 25-22.036, F.A.C.
December 7, 2007	Ms. Freeman sent a responsive e-mail to Commission staff complaining that the amount offered was wrong.
December 18, 2007	Ms. Freeman mailed correspondence to the Commission requesting a formal hearing in accordance with Commission Rule 25-22.036, F.A.C.
December 20, 2007	This Docket was opened.